Bitromax Corp Sdn Bhd v Amil bin Salleh (t/a Perniagaan Sajak) & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S3–24–2190 OF 2003
MOHD HISHAMUDIN J
9 MARCH 2004

Civil Procedure — Originating summons — Claim for possession — Claim against licensee and predecessors in title — Whether plaintiff should have taken writ action instead — Rules of the High Court 1980 O 89

Land Law — Possession — Recovery of — Claim against licensee and predecessors in title — Whether plaintiff should have taken writ action instead — Rules of the High Court 1980 O 89

On 4 February 2000, the sub-tenant ('the plaintiff') entered into a sub-tenancy agreement with TNB Kekal (substituted by the third defendant in a subsequent novation agreement). The second defendant was the owner of the premises. Shortly after, by way of a termination notice, the third defendant terminated the sub-tenancy. Subsequently, the third defendant granted the first defendant the right to manage and maintain the premises. The first defendant went into occupation of the premises on 1 October 2003. The plaintiff filed the present originating summons under O 89 of the Rules of the High Court 1980 ('the RHC') for the recovery of possession of the premises from the first defendant.

Held, dismissing the application with costs:

(1) An O 89 proceedings could not be brought by a person who claims possession of land against a person who enters or occupies that land if such person enters or occupies with the licence or consent of the predecessor in title of the person who claims possession (see para 20).

(2) Here, the third defendant was a predecessor in title since it was the third defendant who sublet the premises to the plaintiff. The second defendant was also a predecessor in title as it was also not disputed that it was the registered owner of the premises. In view of the affidavits of the second and third defendants authorizing the first defendant to enter and occupy the premises, this meant the second and third defendants, as the predecessors in title of the plaintiff, had given consent or a licence to the first defendant to enter and occupy the premises (see para 20).

(3) It was not open to the plaintiff to invoke O 89 against the first defendant. The plaintiff should have taken a writ action against him if it felt aggrieved by the first defendant's entry or occupation of the premises. (see para 20).

[**Bahasa Malaysia summary**

Pada 4 Februari 2000, sub-penyewa ('plaintif') memasuki satu perjanjian sub-penyewaan dengan TNB Kekal (diganti oleh defendan ketiga kemudiannya melalui perjanjian novasi). Defendan kedua adalah pemilik premis tersebut. Sejurus selepas itu, melalui satu notis penamatan, defendan ketiga menamatkan sub-penyewaan tersebut defendan ketiga kemudiannya memberikan hak mengurus dan menyelenggarakan premis tersebut kepada defendan pertama. Defendan pertama mendiami premis tersebut pada 1 Oktober 2003. Plaintif memfailkan saman pemula ini di bawah A 89 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT') untuk mendapat kembali milikan premis tersebut dari defendan pertama.

Diputuskan, menolak permohonan dengan kos:

(1) Suatu prosiding A 89 tidak boleh diambil oleh seseorang yang menuntut milikan tanah terhadap seseorang yang memasuki atau menghuni tanah tersebut jika orang tersebut memasuki atau menghuni dengan lesen atau dengan persetujuan dari pendulu dalam hakmilik orang yang menuntut milikan (lihat perenggan 20).

(2) Di sini, defendan ketiga adalah pendulu dalam hak milik kerana defendan ketigalah yang memberi sub-penyewaan premis tersebut kepada plaintif. Defendan kedua juga merupakan seorang pendulu dalam hak milik kerana ianya tidak dinafikan bahawa ia adalah pemilik berdaftar premis tersebut. Memandangkan afidavit-afidavit defendan kedua dan ketiga yang membenarkan defendan pertama untuk memasuki dan menghuni premis tersebut, ini bermakna defendan kedua dan ketiga, sebagai pendulu dalam hak milik plaintif, telah memberi persetujuan atau lesen kepada defendan pertama untuk memasuki dan menghuni premis tersebut (lihat perenggan 20).

(3) Plaintif tidak boleh menggunapakai A 89 terhadap defendan pertama. Plaintif sepatutnya memulakan tindakan writ terhadap defendan pertama sekiranya terkilan dengan kemasukan dan penghunian defendan pertama di premis tersebut (lihat perenggan 20).]

Notes

For cases on claims for posession, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) para 4116

For cases on recovery of possession, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3125–3133

For scope of O 89 of the Rules of the High Court 1980, see 1 *Halsbury's Laws of Malaysia* para [10.6–063]

Legislation referred to

Rules of the High Court 1980 O 89

Lee Lim Huat (LH Lee & Co) for the plaintiff.
Mohd Harris (Mohd Harris Mohan & Partners) for the first defendant.
Kahiruzzaman Muhammad (Raja Saidatul Raja Lope with him) (Zul Rafiq & Partners) for the second and third defendants.

Mohd Hishamudin J:

[1] This originating summons is an application by the plaintiff under O 89 of the Rules of the High Court 1980 ('the RHC') for the recovery of possession of land.

[2] I have dismissed the application with costs.

[3] The land in question ('the premises') was registered in the name of the second defendant, namely, Tenaga Nasional Bhd.

[4] By an agreement dated 4 February 2000 entered into between the second defendant and a company known as TNB Kekal Sdn Bhd ('TNB Kekal'), the second defendant let out the premises to TNB Kekal.

[5] By an agreement, also dated 4 February 2000, entered into between TNB Kekal and the plaintiff, the said premises was sublet to the plaintiff for a period of three years commencing from 1 September 1999 ('the sub-tenancy').

[6] By a tripartite agreement dated 1 April 2002 between:

(a) TNB Kekal;

(b) the plaintiff; and

(c) the third defendant, TNB Properties Sdn Bhd, a wholly owned subsidiary of the second defendant,

the rights and obligations of TNB Kekal under the sub-tenancy were novated to the third defendant.

[7] By an agreement dated 2 September 2002, the tenure of the sub-tenancy was extended for another three years from 5 January 2003 until 5 January 2006.

[8] By a letter dated 13 November 2002 ('the termination notice'), the third defendant terminated the sub-tenancy. The termination letter gave the plaintiff a three-month's notice as stipulated by the sub-tenancy agreement. The termination is based on cl 8(f) of the sub-tenancy agreement which states:

> Mana-mana pihak mempunyai hak untuk menamatkan perjanjian ini pada bila-bila masa selain dari penamatan di bawah klausa 8(d), 9(e) dengan memberi tiga (3) bulan notis secara bertulis kepada pihak yang lain dengan syarat jika notis penamatan dikeluarkan oleh TNBK sebelum tamat tempoh penyewaan dalam perjanjian sewa

ini, maka TNBK hendaklah membayar kos kerja-kerja ubahsuai yang dilakukan oleh penyewa secara prorate terhadap baki tempoh penyewaan tersebut. Selepas notis itu tamat maka perjanjian ini dan segala yang terkandung di dalamnya akan tamat dan batal tetapi tanpa prasangka kepada apa-apa tuntutan oleh mana-mana pihak terhadap pihak yang lain berhubung dengan pemecahan atau pelanggaran yang terdahulu terhadap mana-mana waad atau syarat dan TNBK hendaklah selepas itu memulangkan kepada penyewa semua deposit tanpa apa-apa bayaran faedah dikenakan bagi mana-mana tempoh selepas tarikh penamatan tersebut.

[9] By a letter dated 17 February 2003, the third defendant granted the first defendant the right to manage and maintain the premises.

[10] The second and third defendants have also averred in their affidavit that they have given their consent to the first defendant to enter the premises for the purpose of managing and maintaining the same.

[11] The plaintiff disputes the validity of the termination notice, and so on 27 February 2003 it filed a suit in the Kuala Lumpur High Court Civil Suit S7 ('the S7 suit') against the third defendant (as the first defendant in that suit) and an entity known as 'Perniagaan Sajak' (as the second defendant). The suit against Perniagaan Sajak in the S7 suit is in reality a suit against the first defendant in the present case.

[12] The plaintiff thereafter in the S7 suit made an interlocutory application for an interim injunction against the first and third defendants to restrain them from entering the premises. The application was, however, dismissed with costs.

[13] By a letter dated 27 August 2003, the third defendant extended the three-month period under the termination notice until 30 September 2003; and requested the plaintiff to hand over possession of the premises on 1October 2003.

[14] On 28 April 2003, on the request of the plaintiff, a meeting was held at the office of the third defendant between the plaintiff, the first and the third defendant, and it was agreed that the plaintiff was allowed to remain in possession of the property until 30 September 2003.

[15] The first defendant went into occupation of the premises only with effect from 1 October 2003.

[16] Quite soon thereafter, on 12 November 2003, the plaintiff filed the present originating summons for recovery of possession of the premises from the first defendant.

[17] I have dismissed the present application with costs.

[18] I have dismissed this originating summons purely on procedural grounds. Order 89 r 1 of the RHC provides:

1 Proceedings to be brought by originating summons

Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons with the provisions of this Order.

[19] In my judgment, the words:

without … licence or consent … of any predecessor in title of his … .

in the above rule, means that an O 89 proceedings cannot be brought by a person who claims possession of land against a person who enters or occupies that land if such person enters or occupies with the licence or consent of the predecessor in title of the person who claims possession. In the present case, the third defendant *vis-à-vis* the plaintiff is a predecessor in title since it is the third defendant who sublets the premises to the plaintiff–and this fact is not disputed. The second defendant is also a predecessor in title as it is also not disputed that it is the registered owner of the premises. In my opinion, in view of the affidavits of the second and third defendants authorizing the first defendant to enter and occupy the premises, this means the second and third defendants, as the predecessors in title of the plaintiff, have given consent or a licence to the first defendant to enter and occupy the premises. Therefore the plaintiff cannot invoke O 89 against the first defendant. The plaintiff, if aggrieved by the first defendant's entry or occupation of the premises, should have taken a writ action against him.

Application dismissed.

Reported by Loo Lai Mee